BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERTO VILLAREAL	)	
Claimant	)	
VS.	)	
	)	Docket No. 239,225
UTILITY CONTRACTORS, INC.	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appeals the preliminary hearing Order of Administrative Law Judge John D. Clark dated August 25, 1999. The Order requires respondent to provide the names of three physicians from which claimant can select one to provide medical treatment for claimant's injury suffered with respondent. Temporary total disability was also ordered paid if claimant was taken off work.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the dates alleged?

(2) Did claimant provide timely notice of the accident on July 15, 1998, and for a series of accidents through the end of his employment with respondent, and again for an accident occurring on January 12, 1999?

(3) Did the Administrative Law Judge exceed his jurisdiction in awarding the benefits requested at preliminary hearing?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board finds as follows:

FINDINGS OF FACT

Claimant was a laborer for respondent and had worked in that capacity since March 20, 1995. As a laborer, he primarily worked in the yard, doing heavy lifting and repetitive activities with his hands. Claimant began noticing problems with his hands in October or November 1997. Claimant took no action at that time. By October 1998, his hand problems had worsened to the point where he felt he needed to seek some type of medical treatment. Claimant spoke to his supervisor, Andy, and advised him that he had pain in his hands. Claimant did not tell Andy that this pain was work-related. It is acknowledged by the parties that Andy does not speak Spanish and claimant speaks very little English.

Shortly thereafter, claimant was transferred to a different job under a new supervisor by the name of Felipe Escamilla. It is acknowledged by the parties that Mr. Escamilla is bilingual, speaking both English and Spanish. Claimant advised Mr. Escamilla that his hands were hurting and more particularly stated "I was feeling bad there at work."

Neither Andy nor Mr. Escamilla have testified in this matter.

Claimant was offered no medical care at that time and, instead, went on his own to Antonio Osio, M.D., and Hector Fernandez, M.D., for examinations and treatment. This treatment was paid for through claimant's health insurance. Claimant continued working for respondent in that capacity until approximately January 12, 1999. On that date, he was helping lay pipe when he felt a "little something" in his back. Claimant told Mr. Escamilla at that time that he thought he had hurt his back. Claimant testified that Mr. Escamilla telephoned the safety manager, but again no medical treatment was provided. Claimant again on his own, returned to Dr. Osio. Claimant was later referred to Perlita Odulio, M.D., for EMG nerve conduction studies to his upper extremities. The tests confirmed claimant had bilateral carpal tunnel syndrome and early ulnar nerve neuropathy in both elbows. Claimant testified that the symptoms were progressing up into his elbows.

Dr. Osio also recommended claimant undergo an MRI examination of his lumbar spine. The MRI failed to uncover significant dural sac compression, disc herniation or protrusion. It did indicate post-surgical changes anteriorly at L4-5. It is acknowledged claimant underwent back surgery in Mexico in 1985 and had a history of three back surgeries in his past from which claimant testified he fully recovered.

Claimant also came under the care of Pedro A. Murati, M.D., for an examination of his back. Dr. Murati, a physiatrist with Midwest Physiatrists in Dodge City, Kansas, examined claimant, diagnosing bilateral carpal tunnel syndrome, left ulnar cubital tunnel syndrome, symptomatic flexor nodules bilaterally, de Quervain's bilaterally and bilateral shoulder strains. He was asked to view and give an opinion on claimant's ongoing back symptoms but, in his report of May 17, 1999, stated he could not give an opinion regarding the back until he was provided with the records from the 1985 back surgery.

Respondent contends that claimant failed to advise respondent of either the hand problems or the back injury and, therefore, has failed to provide notice of an accident as well as proof of the accident itself. Respondent further contends that claimant was working a second job part-time with Mid America Cleaning as a janitor during the time he began developing symptoms in his hands and that the hand symptoms could just as easily stem from the work performed with Mid America Cleaning as with respondent.

CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, it is claimant's burden to prove claimant's entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 1998 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g). In this instance, claimant was the only witness to testify regarding the onset of his symptoms and what he may or may not have told respondent's representatives. Claimant testified that, on two separate occasions, he discussed his hand symptoms with both Andy and Mr. Escamilla, his then supervisors. While claimant acknowledges he did not tell Andy that it was work-related, he did advise Mr. Escamilla that he was feeling bad at work.

Respondent's contention that claimant's hand symptoms may have arisen with Mid America Cleaning is not supported by the evidence, as the description of claimant's job at that employment appears to indicate he did only dusting and light janitorial work. The heavy work performed with respondent was substantially more injurious to claimant's hands than anything performed with Mid America Cleaning. In addition, claimant quit working at Mid America Cleaning in October 1998, but his symptoms continued to get worse thereafter.

With regard to the back, claimant was the only witness to testify. He advised that he told Mr. Escamilla that he had injured his back at work and needed medical treatment. Claimant also testified that Mr. Escamilla, at that time, contacted the safety manager. As there is no testimony from Mr. Escamilla or any other respondent's representative, claimant's testimony in this regard is uncontradicted and will not be ignored as it has not been shown to be untrustworthy. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

The Appeals Board finds, for preliminary hearing purposes, that claimant has satisfied the burden of proving not only accidental injury arising out of and in the course of his employment, but also notice for both the series of injuries to his hands beginning July 1998 and continuing through his last day worked and also the January 12, 1999, back injury. Respondent contends that claimant's notice to its representatives was inadequate. However, claimant's testimony regarding what he said to the respondent's representatives is uncontradicted and satisfies the demands of K.S.A. 44-520. The Appeals Board, therefore, finds that the preliminary hearing Order of the Administrative Law Judge should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated August 25, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November 1999.

BOARD MEMBER

c: Jeff T. Tevis, Wichita, KS
Vincent A. Burnett, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director